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Inc.*

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CASE NO.: C06-04327-JW (PVT)

**OPPOSITION TO PLAINTIFF'S
MOTION TO COMPEL PRODUCTION
OF "DOCUMENTS PREPARED FOR
AND/OR SHARED WITH
DEFENDANT ERNST & YOUNG" BY
JUNIPER AND ITS AUDIT
COMMITTEE**

DATE: February 2, 2010
TIME: 10:00 a.m.
BEFORE: Hon. Patricia V. Trumbull

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1 Juniper Networks, Inc. (“Juniper” or the “Company”) and the Audit Committee of its
 2 Board of Directors respectfully submit this memorandum in opposition to Plaintiff’s Motion to
 3 Compel Production of “Documents Prepared for and/or Shared with Ernst & Young” by Juniper
 4 and its Audit Committee (“Motion” or “Mot.”).

5 INTRODUCTION

6 This is the latest of several motions, noticed for hearing on February 2, where Plaintiff
 7 claims that the work product protection attached to Juniper’s investigation into stock option
 8 backdating was waived to the extent that information was shared with Juniper’s auditors, Ernst &
 9 Young (“EY”). As discussed below and in earlier filings, the better view, and the controlling
 10 rule in this District, is that sharing such work product with outside auditors is not a waiver.

11 RELEVANT FACTUAL BACKGROUND

12 **Background of the Audit Committee Investigation.** This is a securities fraud class
 13 action in which Plaintiff alleges that Juniper and certain of its current and former officers
 14 intentionally backdated stock options in years past, resulting in false financial statements. The
 15 possibility of errors in Juniper’s stock option accounting came to light in early 2006. In the wake
 16 of a subpoena from the United States Attorney and a request for information from the Securities
 17 and Exchange Commission, Juniper’s Audit Committee hired the law firm of Pillsbury Winthrop
 18 Shaw Pittman LLP (“Pillsbury”) to assist in the Audit Committee’s investigation into Juniper’s
 19 historical option granting practices. *See* Motion of the Audit Committee of the Board of
 20 Directors of Juniper Networks, Inc. for Protective Order Regarding the Deposition of William
 21 Hearst (“AC Mot.”), filed December 14, 2009, at 3-4, 13-14 (Dkt. No. 465); Declaration of Kirke
 22 Hasson in support thereof (“Hasson 12/14 Decl.”) at ¶¶ 2-11 (Dkt. No. 466). Pillsbury, in turn,
 23 hired forensic accountants KPMG to assist. Hasson 12/14 Decl. ¶ 12. Pillsbury’s investigation
 24 continued through 2006. *Id.* Juniper ultimately determined that it would need to restate its
 25 financial statements, and issued restated financial statements in March 2007, which were audited
 26 by EY. *Id.* Ex. E.

27 **The Information Shared With EY.** As the Audit Committee investigation progressed,
 28 EY requested that Pillsbury and KPMG share with EY certain work product-protected

1 information regarding the investigation. Declaration of Kirke M. Hasson in Support of
 2 Opposition to Plaintiff's Motion to Compel Production of "Documents Prepared for and/or
 3 Shared with Defendant Ernst & Young" By Juniper and Its Audit Committee ("Hasson Decl.")
 4 ¶¶ 3-5. EY needed certain information in order to adequately audit Juniper's restated financial
 5 statements.¹ *Id.* ¶ 4.

6 **Juniper's Privilege Assertions.** When discovery in this action commenced in
 7 November 2008, Plaintiff served document requests to both Juniper and EY. In timely served
 8 objections, Juniper objected to each of Plaintiff's document requests to the extent it called for the
 9 production of documents containing work product, and in particular, objected to the Plaintiff's
 10 demand for all documents prepared by the Audit Committee during its investigation of Juniper's
 11 historical option granting practices. Declaration of Joni Ostler in Support of Opposition to
 12 Plaintiff's Motion to Compel Production of "Documents Prepared for and/or Shared with
 13 Defendant Ernst & Young" By Juniper and Its Audit Committee ("Ostler Decl.") ¶ 2. In
 14 subsequent discussions with Plaintiff's counsel beginning in January 2009 and stretching into
 15 July 2009, Juniper's counsel and counsel for its Audit Committee repeatedly informed Plaintiff
 16 of their position that the Audit Committee did not waive work product protection by sharing
 17 certain Pillsbury and KPMG work product with EY. *Id.* ¶ 3; Hasson Decl. ¶ 9. In addition,
 18 Pillsbury reviewed documents that EY proposed to produce to Plaintiff, and instructed EY to
 19 either withhold or redact documents that reflected or contained Pillsbury's or KPMG's work
 20 product, which EY did. Hasson Decl. ¶ 8.

21 It was not until the first week of December 2009 – after fact discovery had closed – that
 22 Plaintiff indicated for the first time its intention to bring a motion to compel challenging
 23 Juniper's assertion of work product protection with respect to information that Pillsbury and
 24 KPMG had shared with EY. Ostler Decl. ¶ 4. As recently as November 4, 2009, Plaintiff had
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 26

27 ¹ Plaintiff does not allege that Juniper's restated financials are incorrect. Rather, Plaintiff's
 28 claims relate solely to financial statements issued in *prior* periods.

1 disclaimed any intention of seeking work product that had been shared with EY. *See id.* Ex. 1 at
 2 14:17-15:12. On December 8, 2009, Plaintiff filed the present motion to compel.²

3 ARGUMENT

4 Plaintiff argues that Juniper must produce any documents listed on the four privilege logs
 5 attached to the Declaration of David Harrison (“Harrison Decl.”) (Dkt. 457). Mot. at 1. Plaintiff
 6 argues that Juniper’s disclosure of work product information to EY waived work product
 7 protection for information in those documents of EY. *Id.* at 2. The principal issue before the
 8 Court is whether Juniper’s Audit Committee waived its work product protection by sharing
 9 certain work product with EY. This is because all the documents at issue were withheld or
 10 redacted on the basis of attorney work product protection. *See* Harrison Decl. Exs. A, B, C.³
 11 Therefore, this opposition focuses on Plaintiff’s argument with respect to waiver of work product
 12 protection.

13 At the outset, it is important to note that nowhere in Plaintiff’s Motion does Plaintiff
 14 contend that the work performed by Pillsbury in the Audit Committee investigation was *not*
 15 entitled to work product protection in the first instance. Nor did Plaintiff ever contend, during
 16 any meet and confer conversation or correspondence throughout the entire history of fact
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20 ² The present motion is styled as a motion to compel “documents prepared for and/or shared
 21 with” EY. That title is potentially misleading, because neither Pillsbury nor KPMG prepared any
 22 of the documents at issue for EY. Hasson Decl. ¶ 5. Some of the documents at issue are
 23 documents that reflect work product that was shared with EY. However, Exhibit B to the
 24 Declaration of David Harrison is a privilege log that catalogues attorney-client privileged and
 25 work product protected information of the Audit Committee itself, much of which has no
 connection to and was never shared with EY. *Id.* ¶ 6. Exhibit D to the Declaration of David
 Harrison is a privilege log that catalogues attorney-client privileged and work product protected
 information for Juniper itself, much of which has no connection to and was never shared with
 EY. Ostler Decl. ¶ 7.

26 ³ Plaintiff’s motion states that certain documents on Juniper’s privilege log (Harrison Decl.
 27 Ex. D) were withheld on the basis of attorney-client privilege alone. Mot. at 2 n.2. Subsequent
 28 to Plaintiff’s motion to compel, Juniper re-reviewed its privilege log and determined that those
 documents were not privileged and were included on Juniper’s privilege log in error. Those
 documents have been produced.

discovery in this case, that Pillsbury's work was not entitled to work product protection.⁴ Ostler Decl. ¶ 6.

I. DISCLOSURE TO ERNST & YOUNG DID NOT RESULT IN A WAIVER OF WORK PRODUCT PROTECTION

Plaintiff argues that Juniper's Audit Committee waived its work product protection with respect to information shared with Juniper's outside auditors EY. Mot. at 2-4. That argument lacks merit, and has been definitively rejected in this District.

As previously explained in the Audit Committee's Motion for Protective Order filed December 14, 2009, the disclosure of information to outside auditors does not constitute a waiver of work product protection. *See* Dkt. No. 465 at 15-17. Courts in the Northern District of California have repeatedly so held. *See S.E.C. v. Schroeder*, No. C07-03798 (JW) (HRL), 2009 WL 1125579, at *3 (N.D. Cal. Apr. 27, 2009), *objections overruled by S.E.C. v. Schroeder*, 2009 WL 1635202 (N.D. Cal. Jun 10, 2009); *S.E.C. v. Roberts*, 254 F.R.D. 371, 381-82 (N.D. Cal.

⁴ On November 9, 2009, Plaintiff changed its tune, retreating from its admission that the investigation was protected work product, and taking the new and afterthought position that the investigation itself was not protected work product. Lead Plaintiff's Submission in Opposition to Audit Committee's Motion for a Protective Order as to Statements Made by Former Employee Brienne Fisher to the Audit Committee's Counsel at 7. Citing to an inaccurate statement of law in this circuit, Plaintiff led this Court to an order regarding the interview of one of the witnesses. *See* December 9, 2009 Order regarding the Audit Committee's interview of Brienne Fisher. Dkt. No. 458. On December 18, 2009, Juniper's Audit Committee filed a motion for leave to file a motion for reconsideration of that portion of the Court's December 9, 2009 Order that found that the Audit Committee's investigation was not entitled to work product protection. Dkt. No. 477. As explained in detail in the Audit Committee's Motion for Protective Order filed December 14, 2009, however, Pillsbury's work is indeed entitled to work product protection, because Pillsbury's work was commenced and conducted because of, and in direct response to, government investigations and civil lawsuits. *See* Dkt. No. 465 at 7-15. Juniper expected and intended that Pillsbury, through its investigative work, would advise Juniper's Audit Committee regarding Juniper's potential exposure to criminal and civil litigation and act on Juniper's behalf in responding to subpoenas and requests for information from the Department of Justice and the Securities and Exchange Commission. *Id.* at 14. Juniper also expected Pillsbury's investigation and analyses would be used to assist in Juniper's defense of the private civil litigation that had been filed even before the investigation commenced, and also in defense of any litigation later filed by either the Department of Justice or the Securities and Exchange Commission. *Id.* Pillsbury was hired specifically because of and in response to the threat of civil and criminal litigation, and the work Pillsbury performed was unquestionably done at least in part to advise and defend Juniper in response to threatened and actual litigation. *Id.* Accordingly, under Ninth Circuit precedent, Pillsbury's work is entitled to work product protection. *Id.*; *In re Grand Jury Subpoena (Mark Torf/Torf Envtl. Mgmt.)*, 357 F.3d 900, 909 (9th Cir. 2004) (documents prepared *at least in part* to help advise and defend company anticipated litigation are entitled to work product protection).

2008); *In re JDS Uniphase Corp. Sec. Litig.*, 2006 U.S. Dist. LEXIS 76169, at *11 (N.D. Cal. Oct. 5, 2006) (Laporte, J.); *see also Merrill Lynch & Co. v. Allegheny Energy, Inc.*, 229 F.R.D. 441, 449 (S.D.N.Y. 2004).

In *Schroeder*, 2009 WL 1635202, Judge Ware overruled the objections to Magistrate Judge Lloyd's order found at 2009 WL 1125579 (N.D. Cal. Apr. 27, 2009). There, defendant sought evidence regarding the substance of interviews by counsel for a special investigating committee, arguing that disclosures made to the company's outside auditors constituted a waiver of work product protection. As Judge Lloyd explained:

[U]nder the circumstances presented here, this court finds that the better view, recently followed by another court in this district in a different stock option backdating case, is that espoused by *Merrill Lynch & Co. v. Allegheny Energy, Inc.*, 229 F.R.D. 441 (S.D.N.Y. 2004). That court concluded that disclosures to outside auditors do not have the "tangible adversarial relationship" requisite for waiver. *Id.* at 447. The court reasoned:

[A]ny tension between an auditor and a corporation that arises from an auditor's need to scrutinize and investigate a corporation's records and book-keeping practices simply is not the equivalent of an adversarial relationship contemplated by the work product doctrine. Nor should it be. A business and its auditor can and should be aligned insofar as they both seek to prevent, detect, and root out corporate fraud. Indeed, this is precisely the type of limited alliance that courts should encourage.

Schroeder, 2009 WL 1125579, at *9.

Similarly, in *Roberts*, 254 F.R.D. at 382, Judge Patel held that disclosure of information by counsel for an investigating committee to the company's auditors did not constitute a waiver. In *Roberts*, as here, the Board committee investigated allegations of stock option backdating, using independent counsel who interviewed dozens of persons. Judge Patel recognized that the resulting interview notes "are classic attorney work product," *id.* at 375, and recognized that the relationship between the company and its auditor in such a situation is "not an 'adversary or a conduit to a potential adversary.'" *Id.* at 381 (citation omitted). Rejecting the argument that, *in other contexts*, the outside auditor is an "independent watchdog," Judge Patel recognized that in *this* context "the Special Committee and the auditors have a common goal – correct past wrongdoings that occurred . . . – and a common body whose interests they represent" and thus in this context "the auditors

1 and the Special Committee have aligned interests.” *Id.* at 382. The court further found that policy
2 supports this determination:

3 [T]his court finds that its holding furthers the strong public policy of encouraging
4 critical self-policing by corporations. Indeed, sanctioning a broad waiver here
5 would have a chilling effect on the corporation’s efforts to root out and prevent
6 corporate fraud and disclose the results as necessary to its auditors.

7 *Id.*; accord *In re JDS Uniphase Corp. Sec. Litig.*, 2006 U.S. Dist. LEXIS 76169, at *11 (disclosure
8 to outside auditors does not waive work product because it does not increase the danger that true
9 adversaries will obtain the information); *Merrill Lynch & Co.*, 229 F.R.D. at 449 (holding that no
10 waiver occurs where information is shared with outside auditors).⁵

11 In arguing to the contrary, Plaintiff relies on two slip opinions from a case in the Central
12 District of California: *Middlesex Retirement System v. Quest Software, Inc.*, CV 06-6863-DOC
13 (RNBx) (C.D. Cal. July 8, 2009) (“*Quest 1*”) and *Middlesex Retirement System v. Quest*
14 *Software, Inc.*, CV 06-6863-DOC (RNBx) (C.D. Cal. September 18, 2009) (“*Quest 2*”) (attached
15 as exhibits E and F to the Harrison Decl., Dkt. No. 457). Mot. at 2-3. As those decisions
16 acknowledged, they are not consistent with authority in the Northern District of California,
17 which has *rejected* Plaintiff’s position and held that a disclosure to outside auditors does *not*
18 constitute a waiver because auditors are not in an adversarial relationship to the company – and
19 hence, are not a conduit to a potential adversary. See *Quest 1* at 10 (citing *S.E.C. v. Schroeder*,
20 No. C07-03798, 2009 WL 1125579, at *9 (N.D. Cal. Apr. 23, 2009), *objections overruled by*
21 2009 WL 1635202 (N.D. Cal. June 10, 2009)); *JDS Uniphase* 2006 U.S. Dist. LEXIS 76169, at
22 *1-2; *Roberts*, 254 F.R.D. at 375 (N.D. Cal. 2008)); *Quest 2* at 5.⁶

23 ⁵ See also *In re Pfizer Inc. Sec. Litig.*, No. 90 Civ. 1260 (SS), 1993 U.S. Dist. LEXIS 18215,
24 at *21 (S.D.N.Y. Dec. 23, 1993) (no waiver of work product privilege because an auditor is “not
25 reasonably viewed as a conduit to a potential adversary.”); *Gutter v. E.I. DuPont de Nemours &*
26 *Co.*, No. 95-CV-2152, 1998 U.S. Dist. LEXIS 23207, at *13-14 (S.D. Fla. May 18, 1998)
(disclosure to an outside auditor does not waive work product protection because accountants are
not considered a conduit to a potential adversary and there is an expectation of confidentiality);
Lawrence E. Jaffe Pension Plan v. Household Int’l, Inc., 237 F.R.D. 176, 183 (N.D. Ill. 2006)
(holding that independent auditors do not have an adversarial relationship with their clients).

27 ⁶ In addition, as Plaintiff notes, in deciding that outside auditors were conduits to potential
28 adversaries, Magistrate Block was persuaded by dicta from *United States v. Arthur Young & Co.*,
465 U.S. 805 (1984). Mot. at 3; *Quest 1* (Harrison Decl. Ex. E) at 10. *Arthur Young*, however,
did not involve attorney work product at all, let alone the question whether a company’s attorney
(continued...)

1 Plaintiff argues that the Court should follow the *Quest* decision in this instance because,
 2 according to Plaintiff, EY's interests and the interests of Juniper's Audit Committee were
 3 purportedly "not aligned" (Mot. at 3-4), resurrecting the exact "watchdog" argument Judge Patel
 4 explicitly rejected in *Roberts*. Plaintiff thus misses the point recognized by Judges Patel, Lloyd
 5 and Ware in the Northern District, that *in this context* the interests of the committee and the
 6 auditors are aligned.

7 The relevant inquiry is whether the disclosure of work product to a third party enables an
 8 *adversary* to gain access to the work product. *Schroeder*, 2009 WL 1125579, at *8; *Roberts*, 254
 9 F.R.D. at 382. It therefore makes no difference whether EY's interests were perfectly aligned
 10 with those of the Audit Committee, or whether the sharing of work product served a "litigation
 11 purpose," as long as EY and the Audit Committee did not have an adversarial relationship and
 12 EY was not a conduit to a potential adversary. *Schroeder*, 2009 WL 1125579, at *9; *Roberts*,
 13 254 F.R.D. at 382; *accord Merrill Lynch*, 229 F.R.D. at 446-47 (waiver analysis focuses on
 14 existence of adversarial relationship).

15 In that regard, the majority of courts to address similar factual circumstances – *i.e.*, a
 16 company's investigative committee sharing certain work product with the company's outside
 17 auditors – have found that disclosure to auditors does *not* waive work product protection because
 18 the work product is shared with the auditors in furtherance of the *common goal* of correcting past
 19 errors in financial statements. *Schroeder*, 2009 WL 1125579, at *9; *Roberts*, 254 F.R.D. at 382;
 20 *Merrill Lynch*, 229 F.R.D. at 448.

21 Juniper's relationship with EY, and the nature of the work product disclosures made to
 22 EY in this case, is indistinguishable from the facts presented in *Schroeder*, *Roberts*, and *Merrill*
 23 *Lynch*. Juniper's Audit Committee shared certain work product with EY as necessary to allow
 24 both Juniper and EY to work side-by-side on the common task of determining the existence and
 25

26 (...continued from previous page)
 27 work product protection is waived by sharing work product with the company's auditors.
 28 Rather, in *Arthur Young*, the Supreme Court declined to recognize a new "auditor" work product
 privilege that would shield auditors' work papers from disclosure in response to an IRS
 subpoena. 465 U.S. at 815-21.

1 scope of accounting errors in Juniper's historical financial statements, and correcting those
 2 accounting errors by issuing restated numbers. As in *Schroeder, Roberts, and Merrill Lynch*,
 3 Juniper's Audit Committee responded to EY's requests for information so that EY could further
 4 assess Juniper's internal controls and assist in EY's audit of Juniper's restatement. 229 F.R.D. at
 5 448. These tasks were part of the joint effort of both Juniper and EY to detect errors, understand
 6 how those errors occurred, and correct those errors. Moreover, EY, as Juniper's outside auditor,
 7 was under an ethical obligation to keep information confidential except under limited
 8 circumstances not present here. See *Merrill Lynch*, 229 F.R.D. at 448 (holding that outside
 9 auditors were "under an ethical and professional obligation to maintain materials received from
 10 its client confidential, unless disclosure was required by law or accounting standards"); see also
 11 American Institute of Certified Public Accountants Rule § 301.01, available at
 12 http://www.aicpa.org/about/code/et_300.html ("A member in public practice shall not disclose
 13 any confidential client information without the specific consent of the client.").

14 Accordingly, in the case at bar, although Pillsbury shared certain information, as selected
 15 by Pillsbury, with Juniper's outside auditors EY, those disclosures did not waive the work
 16 product protection that applied to the shared information.

17 **II. PLAINTIFF HAS ACCESS TO THE FACTS AND IS SEEKING OPINION**
 18 **WORK PRODUCT WITH NO SHOWING OF SUBSTANTIAL NEED OR**
UNDUE HARDSHIP

19 Plaintiff's present motion seeks the wholesale production of all documents containing
 20 work product that was shared with EY. Mot. at 1. Accordingly, the documents Plaintiff seeks
 21 contain opinion work product. Indeed, that is the very reason Plaintiff seeks them. The opinions
 22 and thought processes of counsel are fundamentally the only category of information related to
 23 the Audit Committee's investigation to which Plaintiff does not already have access. Plaintiff
 24 has had fulsome discovery into the *facts* underlying its claims – *i.e.*, that certain of Juniper's
 25 current and former officers backdated stock option grants in the years 1999 – 2003. Indeed,
 26 Plaintiff already has at its disposal every piece of information that the Audit Committee and its
 27 counsel had, and Plaintiff does not contend otherwise. Plaintiff has reviewed the same
 28 documents and deposed the same witnesses. The *facts* are there for Plaintiff's use.

Plaintiff's attacks on the Audit Committee's assertion of work product protection are not about Plaintiff seeking access to facts or evidence. Plaintiff wants to know what the Audit Committee's counsel *thought* about the facts and evidence, what the Audit Committee's counsel *concluded* about the facts and evidence, and what the Audit Committee's counsel *believed* based on the very same evidence to which Plaintiff has the same access. In short, Plaintiff's aim is to get access to the thought processes, mental impressions, reasoning, conclusions and opinions of the Audit Committee's counsel. This is classic opinion work product and is entitled to the most stringent protection. *See Roberts*, 254 F.R.D. at 374-75 (party seeking opinion work product must show more than mere substantial need or undue hardship; opinion work product is discoverable only if it is “*at issue* in the case and the need for the material is compelling”) (quoting *Holmgren v. State Farm Mut. Auto. Ins. Co.*, 976 F.2d 573, 577 (9th Cir. 1992) (emphasis in original)); *see also Employers Ins. of Wausau v. Cal. Water Serv. Co.*, No. C-06-3002 PVT, 2007 WL 2947423, at *5 (N.D. Cal. Oct. 6, 2007).

Plaintiff has shown no justification at all for ordering the production of opinion work product here. In fact, Plaintiff does not even hint that it has any need whatsoever for access to the withheld work product – let alone that Pillsbury's opinions and mental impressions are “at issue” and that Plaintiff has a “compelling need” for them.⁷ *Roberts*, 254 F.R.D. at 374-75 (quoting *Holmgren*, 976 F.2d at 577). Absent such a showing, there is no basis to order that Pillsbury's opinion work product be disclosed. As the Supreme Court observed in *Hickman v. Taylor*, “Not even the most liberal of discovery theories can justify unwarranted inquiries into the files and the mental impressions of an attorney.” 329 U.S. 495, 510 (1947).

⁷ Indeed, if Plaintiff truly believed that it had any need at all – let alone “compelling need” – for Pillsbury's work product in order to prepare its case, then certainly Plaintiff would have acted more promptly in pressing its argument. Juniper's counsel informed Plaintiff of its position vis-a-vis work product no later than January 16, 2009, yet Plaintiff waited almost an entire year (and after the *end* of fact discovery) to file this motion. Ostler Decl. ¶¶ 2-4. This conduct belies any possible contention that Plaintiff has any need whatsoever for this work product.

CONCLUSION

For the foregoing reasons, the Court should deny Plaintiff's Motion.

Dated: January 12, 2010

PILLSBURY WINTHROP SHAW PITTMAN LLP

By: /s/ Kirke M. Hasson
Kirke M. Hasson

*Attorneys for the Audit Committee of the Board of
Directors of Juniper Networks, Inc.*

1 Dated: January 12, 2010

2 WILSON SONSINI GOODRICH & ROSATI
3 Professional Corporation

4 By: /s/ Joni Ostler
5 Joni Ostler

6 *Counsel for the Juniper Defendants*

7 **ECF CERTIFICATION**

8 I, Joni Ostler, am the ECF User whose identification and password are being used to file
9 this OPPOSITION TO PLAINTIFF'S MOTION TO COMPEL PRODUCTION OF
10 "DOCUMENTS PREPARED FOR AND/OR SHARED WITH DEFENDANT ERNST &
11 YOUNG" BY JUNIPER AND ITS AUDIT COMMITTEE. In compliance with General Order
12 45.X.B, I hereby attest that Kirke M. Hasson has concurred in this filing.

13 Dated: January 12, 2010

14 WILSON SONSINI GOODRICH & ROSATI
15 Professional Corporation

16 By: /s/ Joni Ostler
17 Joni Ostler